IN THE COURT OF QUA
THE PEACE OF THE
OF PHILADELPHIA

COMMONWEALTH

vs.

C. CATHCART TAYLOR

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT

PAPER BOOK OF DEFENDANT

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HISTORY OF THE CASE

This is an indictment against the City Editor of The Press for an alleged false, malicious and defamatory libel published of and concerning one David H. Lane, in The Press of November 25th, 1872. The article is quite long and most of it has no bearing on the present proceeding, but the whole of it was clipped out of the paper and pasted in the indictment. That part which, at the trial, was claimed to refer to Mr. Lane, together with the only innuendo in the indictment, is as follows: —

"The instigation of Marra's crime was the furnishing of the money to have the job done. Lister, it is asserted, had the money and from him it was transferred to McMullen, who paid all that was ever paid.

"Among the contributors to the fund, who met at the Malta and on Walnut Street above Front, were a number of very

PROMINENT LOCAL POLITICIANS.

They were contributors to the fund. One or more of these parties were at the time partners in a distillery on Church Lane, Germantown, built by Bruner, and among those interested in that distillery were David Haggerty, David Lane [*meaning and intending the said David H. Lane*] and Mr. McCrodden, of Scranton. Some of the politicians referred to were the intimate friends of Delos P. Southworth, now in the City Treasurer's office, but at that time internal revenue supervisor of the Eastern district.

"In March, April, May and June, 1869, it is stated that the

SUM OF $75,000.-

was collected by these parties for the purpose of influencing certain revenue officials, but it is believed none of it ever reached its destination. The parties referred to had a good share in the introduction of the Tice meters spoken of, each one costing $2700.-, and the distillers were black-mailed $300.- a week each."

At the trial, on December 24th, 1872, it was proved by the Commonwealth and admitted by the defence that Mr. Taylor is the City Editor of The Press, that the article was prepared by a reporter under his direction from a written statement given by him, and was published after supervision by the managing editors. On the day of the publication Mr. Lane had several interviews with the defendant and others connected with the paper, when Mr. Taylor emphatically disclaimed all intention of imputing to him any connection with

the whiskey fund, and stated that his name was used merely to identify the distillery, which, we believe we can prove, did contribute to the fund. But to satisfy him, a correction dictated by the district attorney, who was then acting as his private counsel, was inserted in The Press of November 26th (the next day) Mr. Lane also testified that he was a book keeper in this distillery, although before the Recorder at the preliminary hearing he had denied any connection with it. Some of Mr. Lane's personal history was brought out on cross-examination, and will be referred to in the argument. Several witnesses testified that by "David Lane" they understood David H. Lane the prosecutor. The District Attorney proposed to prove by one of these gentlemen (Mr. James Rees) "that the article was so constructed that it meant to "charge Mr. Lane with being one of the parties to the fund." This offer was objected to and *withdrawn* and we respectfully submit that the part of the charge set forth in our seventh reason for a new trial arose from a misapprehension of the evidence.

The Commonwealth also called George Mountjoy for the purpose of proving actual malice. He testified that Mr. Taylor had called on him in company with Messrs. Ashmead and Tatham and others, "who called themselves reformers" for the purpose of getting some information with regard to Mr. F. Theodore Walton, and the distillery business; that he told Mr. Taylor that he knew nothing against Mr. Walton; that Mr. Taylor said that if he could not get at Mr. Walton directly, he would do so through his friends, and inquired about the prosecutor and that he replied that he knew of no connection between Mr. Lane and any distillery.

Mr. Taylor testified on his own behalf. For the purpose of the case he assumed the responsibility for the article. The Court refused to permit him to testify "where he got the "information upon which the article was based," but permitted him to contradict Mountjoy's version of the interview.

To do this, he desired to refresh his memory by a memorandum made by him within an hour after the interview. A short hand reporter had accompanied him and taken down the conversation, and this memorandum was a copy of the short hand notes, but the witness's memory confirmed the notes as he wrote it down. The Court refused him leave to look at the paper, on the ground that such a memorandum must be made *at* and not *near* the time.

Mr. Taylor then denied that Mountjoy had told him that Lane had no interest in the distillery or that he had said that if he could not get at Mr. Walton directly, he would do so through his friends or that he had first mentioned Mr. Lane's name. He then proceeded substantially as follows: —

The great bulk of the conversation was directed towards Mr. Theodore Walton, then a candidate for election as Recorder of Deeds; Mountjoy stated $75,000.- had been collected by Mr. Walton to be used in corrupting revenue officials; that it was represented by him to the distillers from whom he collected it, that the fund was to be used for that purpose; the name of Delos P. Southworth was mentioned; he said Mr. Walton had represented that part of the money was to be given to Mr. Southworth, but in justice to him he didn't believe Mr. Southworth got a cent of it; he said he believed that Mr. Walton pocketed the greater part of it; he said that Theodore Walton was at that time a partner in a distillery in Germantown; he was not certain about the place; he thought on Church Lane — "anyhow, it was the distil-"lery built by Bruner and Dave Haggerty, Dave Lane and "McRodden were interested in it:" he Mountjoy, was a distiller at that time and he said "he, along with most of the "others contributed to this fund;" $300.- was the sum per week and it passed through Mr. Walton's hands because he was on intimate relations with Mr. Southworth and other officials; this had some connection with the Tice meter; there was a Mr. Wilcox, who had procured a letter to be written

to the head of the department asking for a letter to the first five districts for the introduction of this meter; it cost $2700.- each. Wilcox, taking his cue from Walton, procured the letter; he said "Mr. Walton levied the black-mail of $300.- "a week, ostensibly to corrupt revenue officials, but he be- "lieved the most of the money went into Mr. Walton's own "pocket, otherwise how could he open bottles of wine and "live as he had been doing, driving horses &c.?" the whole conversation was Mr. Mountjoy's; I asked him one or two questions; I asked him "if he believed Walton had the "audacity to put the whole"$75,000.- in his own pocket?" and he replied "how else could he live as he did?" at the conversation he said that "Lister and Marra had been friends "in boyhood and one was a gentleman and the other an "acknowledged rough;" he said "Mr. McMullen had the "money and had paid all the money that was paid — five "dollars he believed — for the assassination of Detective "Brooks;" the conversation was in consequence of the arrangement made in the presence of others and I told him that I came for his statement; he then told me about Marra, McMullen and Smith and then went on to the statement in regard to the distillery; I had never heard of Mr. Lane until Mr. Mountjoy mentioned his name, incidentally, as I have stated.

Upon the question of malice and meaning, he testified that Mr. Lane's name was used solely to identify the distillery and that he did not know Mr. Lane as a politician.

The Court then over-ruled an offer to prove that the article in question had been submitted to officers of the government familiar with the operations of the "whiskey ring" and was by them pronounced substantially correct.

REASONS FOR A NEW TRIAL

The defendant moves for a new trial and assigns the following reasons: —

First. Because the learned Judge who tried the case erred in admitting evidence that the prosecutor, David H. Lane, was meant by the David Lane mentioned in the article complained of.

Second. Because the learned Judge erred in admitting evidence on behalf of the Commonwealth of an allegation not in issue and of which there is no averment in the bill of indictment, to wit, that the prosecutor, David H. Lane, is a prominent local politician.

Third. Because the learned Judge erred in refusing to permit the defendant, when testifying on his own behalf, to refresh his memory respecting a certain conversation between him and one George Mountjoy, by referring to a memorandum of said conversation made within an hour thereafter and while it was fresh in his recollection.

Fourth. The Court erred in excluding evidence on the part of the defendant respecting the sources of the information respecting the matters set forth in the article complained of.

Fifth. The Court erred in excluding evidence on the part of the defendant that he had submitted the article complained

of to several government officials familiar with the operations of the "whiskey ring," and that they had approved the article as substantially correct.

Sixth.- The Court erred in excluding evidence on the part of the defendant that the said article, as originally written, referred directly and in terms to Mr. F. Theodore Walton; that at the time of publication it was modified by striking out Mr. Walton's name, and inserting certain more general words merely for the purpose of screening Mr. Walton, and without any reference to Mr. Lane, or adverting to the possibility that the article as altered might be construed as referring to him.

Seventh.- Because the learned Judge mistook the evidence of Messrs. Warburton, Greene, Taggart, Rees, Widener, Porter and Tittermary, and instructed the jury with reference to the same as follows, viz: —

"It will be for the jury to say whether, upon the face of "the article in question, aided by this innuendo and the evi- "dence offered in support of it, they are satisfied beyond a "reasonable doubt that the alleged libel meant to include "the prosecutor among those who contributed to the fund "for the assassination of Brooks. A number of witnesses, Mr. "Warburton, Enoch W. C. Greene, John H. Taggart, James "Rees, Peter A. B. Weidener, Charles A. Porter and Mr. Tit- "termary say that they so understood it."

Whereas said witnesses merely testified that by David Lane, mentioned in the article, they understood David H. Lane, the prosecutor.

Eighth.- Because if the Court correctly apprehended the evidence mentioned in the next preceding reason, the counsel for the defendant mistook the same, and by reason of such mistake neither cross-examined said witnesses, nor called

other witnesses to show a different understanding of said article on their part, nor commented on said evidence in their arguments before the jury.

Ninth. Because the learned Judge submitted to the jury as a question of fact, the question whether the article complained of charged that the prosecutor, David H. Lane, was connected with the raising of a fund to procure the assassination of Brooks, although there is no averment in the indictment that said article so charged, and said question is not included in the issue joined.

Tenth. Because the learned Judge submitted to the jury as a question of fact, the question whether the prosecutor is a very prominent politician, although there is no such averment in the indictment.

Eleventh. Because the learned Judge erred in ruling that the publication of an article proper for public information by a journalist, upon reliable information, acting in good faith and with an honest belief in its truth, is not justifiable or privileged or excusable unless its exact truth be proved before the jury.

Twelfth. The learned Judge erred in his answer to defendant's fifth point, which point and answer are as follows, viz: —

"*Fifth.* The jury must consider the intent of publication —
"the object — and if honestly meant, their verdict must
"be for defendant,"

"If the effect of the publication was to defame and injure,
"the law presumes such to have been the intent and object.
"The question of the honesty of the publication so far as it
"has any application to this case, signifies a publication with-
"out malice. If the jury find there was no malice they should

"acquit the defendant. If, however the article is a libel, and "its tedency is to degrade and defame the prosecutor, the "law presumes the malice."

Thirteenth: — The learned Judge erred in qualifying his affirmation of defendant's sixth point, which point and answer are as follows, viz:-

"*Sixth.*- The subject of this article was proper for public in- "formation and therefore privileged.

"It is conceded by the Commonwealth that the subject of "the article was proper for public information. This being "so, it was privileged so far as to make the truth a defence."

Fourteenth: — The learned Judge erred in his answer to defendant's seventh point, which point and answer are as follows, viz:-

"*Seventh.*- If the defendant, as a newspaper editor, honestly "believed in the truth of the facts published, it is an ingre- "dient to be considered by the jury in determining whether "the publication was a libel, that is, whether it exceeds "the limits of fair and proper comment.

"The fact that the defendant is an editor does not place "him in a different position from that of any other citizen. "The control of a printing press confers upon him no im- "munity whatever to hold a citizen up to public hatred "and contempt. A man may freely write and print on any "subject, but he is responsible to the law for the abuse of "this privilege. In matters proper for public information, "the truth is a defence; the belief of the editor or person "making the publication in the truth of the statement con- "tained therein is not necessarily a defence. If the jury be- "lieve that the article in question does not exceed the limit "of a fair and proper comment, it is not a libel. But to so "find they must be satisfied from the evidence that the alle- "gations contained therein are true."

Fifteenth: — The learned Judge erred in his answer to defendant's ninth point, which point and answer are as follows, viz: —

"*Ninth:*- To make this libellous there must be an averment "in the indictment that the said David Lane was intended "to be described as one of the contributors to that fund "raised at the Malta and, that not being done, the defend- "ant must be acquitted."

"I decline to affirm this point. The jury will find from "the alleged libel itself, with the innuendo averring that the "prosecutor was the person meant, and the evidence in sup- "port of such innuendo, whether the said prosecutor was re- "ferred to as one of the contributors to the said fund."

MOTION IN ARREST OF JUDGMENT

The defendant moves in arrest of judgment for the following reasons: —

1.- For that the Bill of Indictment properly charges no crime or offence.

2.- For that the only direct reference to the prosecutor in said alleged libellous publication is the assertion that he was among those interested in a certain distillery, which assertion is not libellous.

3.- For that, if it be intended or supposed that the writer of said publication, meant and intended to assert therein that the said prosecutor was one of a number of very prominent local politicians, who contributed to the fund therein

mentioned, and if said supposed assertion is claimed to be a libel against the said prosecutor, it ought to have been averred in said Bill of Indictment that said prosecutor was a very prominent local politician, and such supposed meaning of the writer should have been set forth by appropriate innuendoes.

4.- For that, if it be intended or supposed that the said writer of said publication meant and intended to assert therein that the said prosecutor was one of those parties who collected the sum of $75,000.- as therein set forth; and if said supposed assertion is claimed to be a libel against the said prosecutor, said supposed meaning and intention should have been set forth in the said Bill of Indictment by appropriate innuendoes.

5.- For that, if there be any other matter or thing in the said publication, by which the said prosecutor supposes the writer thereof meant or intended to hold him the said prosecutor up to public disgrace or ridicule, such meaning or intention, and all facts necessary for the understanding thereof should have been duly set forth in the said Bill of Indictment.

6.- And for that, the said Bill of Indictment is in other respects uncertain, informal and insufficient.

ARGUMENT FOR DEFENDANT

The reasons may conveniently be divided into five classes: —

I

The insufficiency of the indictment: the admission of evidence upon questions not in issue, and the submission of those questions to the jury.

II

The refusal to permit the defendant, when testifying, to refresh his memory by a memorandum made by him within an hour after the occurrence of which he testified.

III

The mistake with regard to the evidence of Messrs. Warburton and others.

IV

The refusal to permit the defendant to show the language of the article when it left his hands, and how it was altered, which evidence bears upon the responsibility for the alleged libel, the meaning of the article and the intent and malice of the writer.

V.

Holding that, although the matter is admitted to be eminently proper for public information, no diligence in procuring and learning the exact facts, no information however reliable, no good faith in the publication, no absence of malice, and no legal and laudable purpose, are a defence, unless the exact truth of the writing is proved.

I

The indictment is defective. The prosecutor is directly mentioned only as one of several persons named as "among "those interested" in a certain distillery. If he is included among those who contributed to the illegal whiskey fund, it is only by allusion, reference and implication. The rule is thus laid down in *Whar. C. L. § 2604.* "If the libellons matter be not direct, but only libellous by *allusion or reference*, the fact understood must be stated by introduction, and must be pointed at by explanatory innuendoes."

See also Whar. Prec. of Indict. (939) note c;
*1 Chitty. Pl. * 406 - 7;*
3 Chitty. C. L. 375 a;
1 Starkie C. L. 132, also pp. 118 - 119;
See many cases collected in Starkie on Slander p. 362 (Ed. of 1869).

But we need not multiply authorities, for the charge of the court in this case is sufficient for our purpose. The law was correctly stated, but we think not correctly applied.

"It is true there is no innuendo of the character referred "to. The office of an innuendo is to explain an ambiguity "apparent on the face of the libel. Thus, if the alleged li-

"bellous matter is capable of a double meaning, and there is "a doubt as to the sense in which the words were used, then "the meaning which the defendant intended to attach to them "may be averred by innuendo. Again, if the prosecutor be "not named in a libel, or if his name be incorrectly given, it "may be averred by innuendo that the prosecutor is the "person meant; and the truth of the innuendo must be "proved as any other fact in the cause. In that portion of "the alleged libel where David Lane is named, there is no "averment that the prosecutor David H. Lane, was thereby "meant and intended."

Of course, *may* is used in the sense of *must*, for an innuendo *may* be used in many other cases. With this suggestion let us apply the Court's own rule. The libellous part of the article begins by stating that "among the contributors * * "were a number of very prominent local politicians. They "were contributors to the fund." Here undoubtedly the prosecutor was not named, and it is quite possible that several "very prominent politicians" might be named, and yet Mr. Lane be overlooked. The article then proceeds to state that *one or more* of these parties were at the time *partners* in a certain distillery, in which three persons named, including the prosecutor, were among those interested. Is not this "an ambiguity apparent upon the face of the libel?" Is not this "capable of a double meaning?" "one or more" of the *partners*, does not necessarily apply to either of these persons who were only "*among* those interested." If it does apply to them, to which of them does it apply? This certainly is at least capable of several constructions. The construction claimed by the prosecution, is rendered still more doubtful by the next sentence. "Some of the *politicians referred to*" &c. showing that the writer did not include all of whom he had just mentioned, but referred back to the previous clause.

Nor is the article made less ambiguous by the subsequent statement "that the sum of $75,000.- was collected *by these*

"*parties* for the purpose of influencing certain revenue of-"ficials." The words "these parties" evidently refer to those already charged with having an interest in the fund. They leave the question who they were, just where they found it. If it were otherwise it could not refer to all those previously mentioned, for among them are not only the builder of a distillery, but one of the revenue officials, who cannot be supposed to have had a part in contributing to the fund.

Any supposed reference to Mr. Lane is infinitely less certain than the meaning of the words upon which suit was based, in *More vs. Bennett 48 Barb, S. C. R. 229.* The rule is there laid down thus (p. 231): "The rule is, where the "words *ex necessitate* expose the plaintiff to public ridicule or "reproach, no explanation or application of the language used "in the libel is required; but where they are at all susceptible "of an innocent construction, such explanation or application "must be added by what pleaders call an *innuendo* or colloqui-"um, or in some cases by both." In this case the libel charged that a prostitute was under the "patronage or protection" of the plaintiff. The Court say [*page 231*], "However im-"probable, it is very possible that the 'protection' of which "the writer speaks may be such as the benevolent often give "to the most erring and debased." The complaint was held "fatally defective in not containing an innuendo explanatory "of these ambiguous words;" so defective that the plaintiff was not allowed to amend. Surely this language was much less ambiguous than ours. It is an established rule of pleading that "pleadings should observe the known and ancient "forms of expression as contained in approved precedents," *Stephen on Pl. Sec. V Rule VIII.* Many instances are given in which demurrers have been sustained for a violation of this principle, *e. g.*, a plea that the defendants were not guilty within six years, was held bad because the invariable form has been to plead in case that the the action did not accrue

within six years, although non assumpsit infra sex annos is good. (*3 Barm & Ald. 448.*) We appeal to the precedents.

3 Chit. Cr. L. 878 and seq.
*2 Chit. Pl. * 620 and seq.*
2 Stark Cr. Pl. 653 and seq.
4 Went. Pl. 199 and seq.
Cobbett's Case, Whar. Am. State Tr. 326.

It will not do to reject all this summarily with the off hand assertion, that it was formerly the practice to overload the record with innuendoes, but this is no longer countenanced, unless some authority is produced showing to what extent the greater laxity is indulged.

But even an innuendo is insufficient to show that the words "very prominent politicians" refer to the prosecutor. *Whar. Cr. L. § 2606*, "Where the persons alleged to have "been libelled are alluded to in ambiguous and covert terms "it is *not sufficient* to aver generally that the paper was com- "posed and published 'of and concerning' the persons al- "leged to have been libelled, *with innuendoes* accompanying "the covert terms whenever they occur in the paper as set "out in the indictment, that they meant those persons, or "were allusions to their names. There should be a full and "explicit averment that the defendant, under and by the use "of the covert terms, wrote of and concerning the persons "alleged to be libelled." For instance an averment by the way of innuendo that the defendant in attributing the authorship of a certain article to a "celebrated surgeon of whisky memory," or to a "noted steam doctor," meant by these appellations the plaintiff, it was held notwithstanding the innuendo, that the declaration was bad for want of an averment that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying them to him, or something to that effect. *Miller vs. Maxwell, 16 Wend. 9;* See also *2 Hill 472 and 12 Johns.*

474. The doctrine is maintained in *Stitzell vs. Reynolds, 9 P. F. Smith 48.*

There is nothing in this article less ambiguous than the libel in *Holt vs. Scholefield, 6 T. R. 691*, that the plaintiff had "foresworn himself," "you know he is perjured." But it was held that even an innuendo of perjury was insufficient, without a previous colloquim setting forth a judicial proceeding, and this case is recognized as law by our Supreme Court in the late case above cited.

We maintain that either the judgment should be arrested for the defects in the indictment, on the ground that it sets forth no libel, or that a new trial should be granted, for admitting evidence of facts not in issue and submitting them to the jury.

II

The defendant should have been permitted to refresh his memory, by the memorandum made within an hour after the conversation of which he testified. "It is not essential that "the memorandum should have been contemporary with the "fact. It seems to be sufficient if it has been made by the "witness, or by another with his privity at a time when the "facts were fresh in the recollection of the witness." *Starkie on Evidence (by Sharswood) * 179 - 180.* This work is very carefully annotated by Judge Sharswood, but he nowhere qualifies or denies this doctrine of the text. See also *1 Greenl. Ev. Secs. 436 to 439. In Sec. 438*, the rule is thus laid down: — "As to the *time when the writing* thus used to restore the recollection of facts *should have been made*, no precise rule seems to have been established. It is most frequently said that the writing must have been made at the time of the fact in question, or recently afterwards. At the farthest it ought to have been made before such a period of time has elapsed as to render it probable that the memory of the

witness might have became deficient. But the practice in this respect is governed very much by the circumstances of the particular case." The following cases are cited as illustrations. To prove the date of an act of bankruptcy committed many years before, a witness was permitted to recur to his own deposition made some time during the year in which the fact happened; *Vaughan vs. Martin, 1 Esp. 440.* In another case before BEST, C. J., the question was seriously discussed whether a copy made six months after the original, could be used, *Jones vs. Stroud, 2 C. and P. 196.* A witness has been allowed to refresh his memory from the notes of his testimony, taken by counsel at a former trial, *Laws vs. Reed, 2 Lewin Cr. Cas. 152.* And from his deposition, *Smith vs. Morgan, 2 M. and Rob. 259.* And from a printed report *Home vs. Mackensie, 2 C. and Fin. 628.* And from notes of another person's evidence at a former trial, examined by him during that trial, *Regina vs. Philpots, 5 Cox Cr. C. 329.* Or *within two days afterwards, ib.* per ERLE, J. So where a witness had forgotten the transaction, but he recollected that while it was fresh in his memory, he had stated the circumstances in his examination before commissioners of bankruptcy which they had reduced to writing and he had signed, he was allowed to look at his examination, *Wood vs. Cooper, 1 Car. and Kir. 320.*

We have not thought it worth while to go outside of the text books, but in view of these cases, we must confess to a little surprise, at the very summary manner in which the point was ruled against us at the trial.

III

The mistake with regard to the evidence of Messrs. Warburton and others.

This part of the charge, if incorrect, was exceedingly

damaging to our case, for it was addressed to the very point to which the Court restricted our defence. Our view is confirmed by the explicit withdrawal by the District Attorney of an offer of similar evidence, by the fact that we neither cross-examined these witnesses nor called others to show their understanding of the article, although we could have called many, and we are further confirmed by the recollection of many who have voluntarily informed us of their understanding of the evidence.

But suppose we are wrong. The only effect is that the mistake is shifted to the defendant and all his counsel, who were and are greatly surprised at the view of the evidence taken by the Court. This of itself is sufficient ground for a new trial. "Surprise" is as good a ground for a new trial in a criminal as in a civil case *Regina vs. Whitehouse, 18 Eng. L. and Eq. 105.* The facts above stated, show that there was no negligence on the part of defendant's counsel and he ought not to suffer for their mistake, if such it was.

IV

The defendant is indicted for composing and writing and procuring to be composed and written a certain paper alleged to be libellous, which was published in The Press and yet the Court refused us permission to put in evidence *the very paper* for which he was indicted, and to show that this was altered and modified after it left his hands! Is this defendant responsible for modifications of his work by others? Surely not. And if he chooses manfully to assume the responsibility for it rather than even to *appear* cowardly to shelter himself behind others, does not the way in which the article was originally written, the modifications and what passed at the time have *some* bearing at least, upon the intent of the writer and the meaning of the article? Here is

a question of fact, who were meant by certain "very promi-"nent politicians." Evidence was produced by the prose-cution upon this point, and the question was left to the jury. Is it not some, nay, conclusive evidence of the meaning of the writer, that he had written a well known name, which was stricken out merely to screen the person actually re-ferred to? We all know what strange mistakes sometimes occur in printing, from sheer accident. If the printers are to be believed, our Supreme Court have decided that an easement is held "subject to the restriction that *it shall be* "*exercised so as to injure others*" *Kincaid's Ap. 16 P. F. Sm. 412.* The word "not" is omitted. Suppose that by a mere typographical blunder the meaning of a sentence is obscured, is not the manuscript evidence to show which meaning was intended? Wherein does this case differ? We propose to show that a plain and unambiguous article, not libellous as to the prosecutor, was altered with an innocent intention, and by sheer accident and oversight, this alteration made it ambiguous. But "the *malice* of the publication is the es-"sence of the offence" (*Whar. Cr. L. Sec. 2525*) and blun-dering rhetoric is no crime, if it were, woe to Judges and lawyers as well as journalists!

All that passed at the time of the composition and publi-cation is evidence. "These surrounding circumstances, con-"stituting parts of the *res gestæ* may *always* be shown to the "jury along with the principle fact." "Thus in the trial of "Lord George Gordon for treason, the cry of the mob who "accompanied the prisoner on his enterprize was received in "evidence, as forming part of the *res gestæ* and showing the "character of the principal fact. So also * * * or "changes his actual residence or domicil, or is upon a journey "or leaves his home, or returns thither, or remains abroad "or secretes himself, or in fine does any other act, material "to be understood, his declarations made at the time of the "transaction and expressive of its character, motive or object

"are regarded as verbal acts indicating a present purpose "and intention, and are therefore admitted in proof like any "other material facts." *1 Greenl. Ev. Sec. 108. See also Starkie on Ev. by Sharswood * 87 and seq.*

Very many cases English and American (including Pennsylvanian) might be cited illustrating this doctrine, but it is too familiar to require it. Whenever the meaning, intention or animus of an act, is to be determined, the declarations and statements of the parties and others in their presence, at or about the time, are the best evidence of it. This rule would seem to require the admission of the evidence which we offered.

V

It is conceded that the matter published is eminently proper for public information. We contend, that in such cases absolute verity is not required for a defence, but if defendant acted with due diligence and upon reliable information, with a *bona fide* intention to serve the public, the matter is quasi privileged and the writer is not liable criminally in an action by that very public whom he was endeavoring to benefit.

A malicious intention is essential in every crime. "It may "safely be laid down as a general rule of law, that in all "criminal prosecutions the *motive* which influenced the mind "of the individual charged, at the time he commits the al-"leged offence, is the criterion by which the jury are to de-"termine his guilt or innocence." *Com. vs. Sanderson, 3 Pa. Law J. 275.* The Court there shows that this principle is applied in the trial of all crimes. The case of homicide is given as an instance, and also larceny, in which, if it be shown that the goods were taken by mistake, or under an honest and fair claim of right or property, *even if mistaken*, the presumption of a corrupt motive is rebutted. It is there held

that the same rule prevails in prosecutions for libel. "It "may safely be asserted that the *act* alone of publishing a "libel is not of itself punishable as a crime." "The *evil* "*motive* must enter into the constitution of the offence of "libel as much as that of any other crime."

We are informed that this case was decided after consultation between all the judges and that they all concurred. It certainly establishes no new rule. Every one remembers the case cited by Coke in argument in a case reported in *Cro. Jac.* A clergyman, in his sermon, read from Fox's Book of Martyrs the statement that a certain person's violent and cruel death was a judgment of God on him. So far from having met with a violent death, he was among the congregation and heard the sermon. In an action for slander, it was held that as the parson was endeavoring to benefit his congregation, the presumption of malice was rebutted.

In the great case of *The People vs. Croswell, 3 Johns. Cas. 341*, the Court refused to permit the truth of the article to be proved, and withheld the motive of the defendant from the consideration of the jury. A motion for a new trial was refused by an evenly divided Court. KENT, J. (afterwards Chancellor) in an opinion favoring a new trial declaimed most eloquently against the ruling, and held that it was impossible to commit this or any other crime without a guilty intent, and that the facts should be given in evidence to show what the intent was. The whole of the learned opinion is so directly in point that we are unable to select specific passages, and ask the Court to read the whole of it carefully.

In *Com. vs. Clap, 4 Mass. 163*, PARSONS, C. J. held (*page 168*) that "the essence of the offence consists in the malice of the "publication," and (*page 169*) that although the truth alone is no justification in a criminal suit, "yet the defendant may "repel the charge, by proving that the publication was for a "justifiable purpose, and not malicious nor with intent to "defame."

It will doubtless be argued that the Court in *Sanderson's* case and in *People vs. Croswell*, only admitted that *the truth* was a defence, but it is not decided that this is a substantial defence of itself, but it is admissible *only* as *evidence of the intent* of the writer, and to show his want of malice. But this is certainly a question which depends upon his information at the time of writing. He has information equally credible of the existence of two distinct facts, which he thereupon publishes. One of them turns out to be true, the other, false. His motive and intent must certainly have been the same in each case, and we submit that it is absurd to hold that one publication is malicious and the other innocent and perhaps praiseworthy. But this has been distinctly decided. In *Respublica vs. Dennie, 4 Yeates 267*, YEATES, J. instructed the jury (*page 271*) "that if the pro-"duction was honestly meant to inform the public mind, and "warn them against supposed dangers in society *though the* "*subject may have been treated erroneously*" * * * "then "*the judgments of the jury may incline them to think individu-*"*ally*, they should acquit the defendant." And to give the defendant the benefit of any doubt as to the intention.

The English cases in our favor are numerous.

The King vs. Lord Abingdon, 1 Esp. 226 - 228. LORD KENYON held "that in order to constitute a libel the mind "must be in fault and show a malicious intention to defame; for if published inadvertently, it would not be a libel." There was no evidence whatever of the truth of the libellous words.

Toogood vs. Spyring, 1 Cromp. Mees and Rosc. 192, PARKE, B., uses the following language: — "And the law considers "such publication as malicious unless it is fairly made by a "person in the discharge of some public or private duty "whether legal or moral," * * * "In such "cases the occasion prevents the inference of malice which "the law draws from unauthorized communications and af-"fords a qualified defence, depending upon the absence of

"actual malice. If *fairly* warranted by any reasonable occa-"sion or exigency, and honestly made, such communications "are protected for the common convenience and welfare of "society; and the law has not been restricted to make them "within any very narrow limits." The Court also say that the question, who has any interest in the inquiry, has been "very liberally construed." They therefore held that the information to a third person that the plaintiff had broken open his cellar door and drunk his cider, was privileged, although a person not interested happened to be present. This case is cited with approval by BYLES, J., *Whiteley vs. Adams, 15 C. B., N. S. 419 (109 E. C. L. R.)*.

A fair example of this rule, showing that where it applies the truth is not necessary to be proved, is contained in *Tinden vs. Westlake, 1 Moody and Malkin 461*, which was an action for a hand-bill published by defendaut, offering a reward for certain lost bills of exchange "and which Mr. West-"lake believes to have been embezzled by his clerk." TINDAL, C. J., that if the publication was made in the opinion that it was necessary either for the purposes of justice or to protect the defendant against liability on the bills, they might give the defendant a verdict.

Accepting the rule of *Toogood vs. Spyring*, that where the publication is "in the discharge of some public or private "duty" it is privileged or quasi privileged, and that malice is not presumed, but must be proved, we maintain that a journalist is the servant of the public, paid for the purpose of giving the public information upon the current matters of the day. In *Cox vs. Feeney, 4 F. and F. 17*, COCKBURN, C. J. says, "I shall ask the jury whether they believe that it was "published by the defendant to do an injury to the plaintiff "or to give the public that information which as a public "journalist *it was his duty* to give." On *page 21*, he says: "I take it that if the report had been published at the time, "no man could say that it was beyond the province of a public

"journalist, whose business, *aye and I say whose duty*, it is "to bring before the public information which may be useful "to them — it would be his duty to publish the report from "beginning to end." Lord COCKBURN left the case to the jury upon two questions; first, was it a matter of public moment; second, was it published with an honest desire to afford the public information, or with a sinister desire to do personal injury to the plaintiff.

Turnbull vs. Bird, 2 F. and F. 508: ERLE, C. J., page 523, instructed the jury that defamatory matter is presumed to be malicious unless published in the performance of any duty, legal or moral, or in the exercise of any *right*, that in regard to matters necessary for the public interests or in the exercise of a public right, the last head applies and defamatory matter may be published, if it is not made the vehicle of slander. On page 524 - 5 he says: — "The rule in these "cases is that the comments are justified, provided the de- "fendant *honestly* believed that they were fair and just. "With that limitation, the law allows the publication. The "word 'malice,' in law, means any corrupt motive, any wrong "motive or any departure from duty."

Koenig vs. Ritchie, 3 F. and F. 413. An insurance Company, in answer to a publication by the plaintiff accusing the directors of fraud, published a pamphlet declaring those charges to be false and calumnious, and asserting that in a suit brought he had sworn in support of those charges in opposition to his own handwriting. It was held that even if a plea of justification were not made out, the publication was privileged and that if it was made *bona fide* for the vindication of the company this was a defence.

Woodgate vs. Ridout, 4 F. and F. 202, was an action for a most virulent attack on the attorney for the plaintiff in another case: COCKBURN, C. J.. left it to the jury to say whether the comment was fairly and honestly made. He says, on page 217, "But in commenting on such matters, a public

"writer, as much as a private writer, is bound to attend to "the truth and to put forward the truth honestly and in good "faith and to the best of his knowledge and ability. *It is "not to be expeeted that in discharging this duty of a public "journalist, he will always be infallible.* His judgment may "be biassed one way or the other without the slightest re- "flection upon his good faith; and therefore, if his comments "are fair, no one has a right to complain." And on page 223: — "If you think that the conduct of Mr. Woodgate, as "it appears upon the proceedings, deserves what has been "said in this article, you must find for the defendant. *Nay "more, if you think that there has only been an error in judg- "ment, with an honest purpose* — that the writer sat down to "write a fair and honest comment upon the case, and has "done so, and that it is a fair comment upon the facts — "you must find for the defendant."

In *Hedley vs. Barlow, id. 224*, the charge was similar and "fair comments" were defined to be "comments which the "jury consider 'fair' in spirit and intention."

Blake vs. Stevens, 4, F. and F. 232. In a text book the case *'Re Blake' 30 Law Jour*, was cited and it was stated that Mr. Blake had been stricken from the roll of attorneys, whereas, he was only suspended for two years. COCKBURN, C. J., reserved the question whether unfairness constituted, or was only evidence of, malice and submitted to the jury the question whether the statement was reasonably fair and, *taking it to be an admitted mistake*, whether it was a mistake which arose from want of reasonable diligence and care.

In Hibbins vs. Lee 4 F. & F. 243, 245, there is a distinct admission that the writer may testify respecting his motive.

Regina vs. Veley 4 F. & F. 1117. This was an indictment against an attorney for writing and publishing in a newspaper a letter defending his client's character, in which he denounced certain affidavits as "false." It was held that if the letter was written honestly the occasion was privileged, and

if the terms used were under all the cicumstances warranted, with regard to which the defendant's indignation might be taken into account, the publication would be protected.

Hunter vs. Sharpe, 4 F. and F. 983, is a very important case. It was an action by a medical practitioner against the proprietor of the Pall Mall Gazette for a very severe article in which quackery and imposture were attributed to him and he was callcd an "imposter" and a "scoundrel." It was held that this was a matter of public interest and public concern, and even if the writer fell into error, "yet if he wrote "honestly and with the intention of exercising his vocation "as a public writer fairly and with reasonable moderation "and judgment, he is entitled to the verdict, that even if he "falls into error as to the facts or the inferences and goes "beyond the limits of strict truth, he is nevertheless privil- "eged." See the whole of *pp. 1005 - 6.*

In *Harle vs. Catherall, 14 L. T., N. S. 801*, MARTIN, B., instructed the jury that there was no limit, except malice, to such comments.

This whole question is carefully considered in a note *3 F. & F. p. 619 & 809.* The annotator after carefully collating many cases, concludes that the rule is that comments on public affairs are privileged, unless in the language of the Lord Chief Justice (p. 621), they "were such as were *so* unreason- "able and outrageous, that no one could honestly have made "them upon the materials before the writer."

Such is the English law. Can it be that the interests of the people can be less freely discussed in Pennsylvania under a popular government, than in England under a monarchy! On the contrary, the cases cited show a liberal tendency. Indeed the doctrine has been here extended even furthcr than in England. *In Com. vs. Featherston 29 Leg. Int. 125 (April 19 1872)*, it was decided that a card warning the public that three judgment notes and a check had been fraudulently obtained, by a member of the bar whose name was (perhaps

unnecessarily) given, was privileged, although judging from the report the fact was otherwise, and although it appeared that it was inserted without the slightest inquiry or examination respecting its truth.

But in this case great caution was exercised on the part of the journalist and defendant Mr. Taylor. The facts were obtained from one of the few men conversant with them; they were submitted as we offered to show, to several prominent officials familiar with the operations of the whisky ring, and were approved by them as substantially correct. Much other evidence might and would have been produced, but professional decorum forbade us to multiply offers of evidence, which the Court had ruled to be inadmissible. The prosecutor's business relations had been unfortunate and had not been such as to render statements against him entirely incredible. He was a revenue official in 1867, under a sixty day commission during which he was arrested and bound over to answer for official misconduct. He was suspended from office and his term expiring during suspension, he never applied for a reappointment, he says he "didn't "think it worth while." Probably it was not, but he was mistaken in his reason, viz: that it was about the time of President Johnson's change in politics, for Mr. Johnson had "swung around the circle" a year earlier. Leaving this employment he became connected with the distillery in question, which was closed by the Government three times, while nominally owned by Jackson, Bird and Gallop successively; he was engaged under the two latter, and nine months after it was finally closed, we again find him there, as the nominal proprietor, but he tells us really a mere salesman to close out the concern for another man. His conduct may have been upright in point of fact, but appearances were against him.

Journalists are not prophets. When the matter published is given to the world under a sense of duty, and after the use

of due diligence (of which the jury alone are judges, see all the cases cited), they ought not to be compelled to assume the risk not only of the accuracy of their statement, but also of their ability to prove them to the satisfaction of a jury. For this reason therefore, as well as those previously discussed, we ask for a new trial.

J. HOWARD GENDELL

GEORGE L. CRAWFORD

BENJAMIN HARRIS BREWSTER

of Counsel for Defendant.

APPENDIX.

CHARGE OF THE COURT.

GENTLEMEN OF THE JURY:—This indictment charges that C. Cathcart Taylor, the defendant, on the twenty-fifth day of November last, within the jurisdiction of this court, maliciously and unlawfully did compose and write, and procure to be composed and written, of and concerning one David H. Lane, a certain false, scandalous, malicious, and defamatory libel; and that on the day and year aforesaid, within the jurisdiction aforesaid, he did print and publish, and cause and procure to be printed and published, the said libel.

The defendant is indicted under the twenty-fourth section of our criminal code, (Purdon, 221, pl. 26,) which section is in these words:—"If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, such person shall be guilty of a misdemeanor."

Our statute defining and punishing libel is merely declaratory of the common law. There has hardly been a period in the history of a civilized nation when defamation was not punishable. By the law of Moses, to slander any one, particularly those in authority, was expressly forbidden. The Persians had a law which declares it infamous to be detected in a lie. The

Athenians, notwithstanding the marked mildness of their laws, punished this offense. "Whoever," says Solon, "shall calumniate any man while alive in the temples, courts of law, treasuries, or where games are celebrated, shall pay three drachms to the injured man, and two to the public treasury."

The law of ancient Rome at one time punished the libeller with death. Subsequent emperors modified the punishment from time to time, and Theodosius was satisfied with holding them in contempt. Justinian, in his institutes, classes libels and defamations amongst private injuries of the highest degree. The English law upon this subject, from which our own is derived, was probably of Roman origin. Be that as it may, from the time of the Roman conquest to the present day, Briton and Roman, Saxon and Norman, have all united in placing the defamer under the ban of the law. King Alfred commanded that the forger of slander should have his tongue cut out unless he redeemed it by the price of his head. A law of King Edgar is to the same purpose. The Normans tempered this Saxon barbarity with a mildness borrowed from the civil law. It will be observed that in that early period, slander was the offense designated by the law. Libel—the more enlarged form of the abuse of speech—could not exist, to any great extent, among a rude and unlettered people. It originated with the advance of letters and refinement, and only became a common offense when the printing-press placed it in the power of almost every one to resort to this potent engine as a means of defamation.

Whilst the law, mellowed by the light of Christianity and the progress of civilization, now punishes libel with none of the cruelty of the Gothic period, it has not by any means lost its abhorrence of the offense itself. And yet so jealous were the founders of our Commonwealth of the individual liberty of the citizen and of the right of free speech and of a free press, that they allowed every man to write, speak, and publish whatever he saw proper, holding him responsible only for the abuse of the privilege. And in order that no narrow judicial construc-

tion should ever fritter away the rights of the people in this respect, it is provided in our organic law, "that the printing-presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." Article IX., section 7, of the Constitution of Pennsylvania.

It will be seen from the foregoing that in this State the liberty of the press is absolute. It is free to whoever chooses to employ it to disseminate his views upon any question of politics, religion, or morals. But liberty does not mean license, and the law, therefore, holds every man responsible for any abuse of this privilege.

It will be observed that, in a certain class of cases, to wit, in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. This is in derogation of the familiar maxim, "The greater the truth the greater the libel;" but the maxim remains in force as to all save the exceptional cases referred to. In civil suits for libel the truth could always be given in evidence by way of defense, but a different rule prevails in criminal prosecutions, for the reason that libels tend to provoke breaches of the peace. Where a man is held up to public ridicule and contempt it is none the less likely to create a breach of the peace that the alleged libellous matter is true.

It will also be observed that the above-recited section of our Constitution provides that "in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." The law was not formerly so. Under the old English practice the court pronounced upon the character of the alleged libel, leaving nothing for the jury but to find the fact of publication and the truth of the innuendoes. This continued to be the law of England up to 1792, at or about which time the statute of 32 Geo. III., commonly known as Mr. Fox's act, was passed. This act provided "that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required or directed to find the defendant guilty merely on proof of publication, and of the sense ascribed to the same in the indictment or information." Pittock *vs.* O'Neill, 13 P. F. S., 253.

Under our Constitution and laws the jury pass upon the whole issue. They find not only the fact of publication and the truth of the innuendoes, but also whether the alleged publication is libellous in its character. The true meaning and proper construction of the section of the Constitution is, not that the jury shall determine the law of libel, for that would be to place the opinion of laymen, unlearned in the law, over that of the judges who are selected by reason of their supposed knowledge of the law; but that the jury shall take the law of libel as expounded by the court, and then determine whether under the law as thus defined the particular article is libellous. The jury are thus the judges, under the direction of the court, upon the trial of every indictment for libel, of the character of the alleged libel. It is for the jury to say whether the publication complained of refers to the prosecutor, and if so whether it is calculated to provoke him to wrath, or to hold him up to public hatred, ridicule, or contempt. You pass upon the whole issue, including the fact of publication, the character of the alleged libel, the truth of the innuendoes, and the question of malice.

A libel is a malicious publication. Malice is an essential

ingredient of the offense. It is therefore important that the jury should understand its meaning.

Malice is a legal term, and implies much more than a particular ill will. It comprehends not only this, but also "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and bent on injury to others, whether any particular person is intended to be injured or not." And malice may be expressed, as where there is a fixed, formed design to libel another: or it may be implied, from the wanton character of the act. The rule upon this subject was well stated by Judge Parsons, in Com. *vs.* Sanderson, tried in this court at January Sessions, 1844, and reported in 2d Penna. L. J. Repts., 276. It is as follows:—"That in all cases where a publication is made which, on its perusal, is calculated to scandalize or defame the reputation of any one, or injure him in the estimation of his fellow-men, or that is calculated to excite the mind of the injured party or his friends to a breach of the peace, and render the person libeled an object of contempt, the law presumes the publication to have been made maliciously, and malice is to be inferred from the act of publication."

There are, however, as was observed by the learned judge referred to in the case above cited, "cases where this legal presumption or inference may be rebutted by evidence which tends to convince a jury that the defendant was governed by no malicious motive in making the publication." Thus, in Commonwealth *vs.* Sanderson, before referred to, where a guest at a public hotel had given out in the newspapers that he had been robbed of his money at the hotel in the night-time, and the proprietor replied to the publication by a counter-statement published in the newspapers, in which he denied that the robbery charged had been committed at his house, and narrated facts to sustain his denial, it was held the defendant might prove the truth of his statement to rebut the presumption of malice. So, for a like purpose, the defendant may show that he delivered the libel as the innocent agent of another, being himself ignorant of the

contents, or that it was published by an agent without his knowledge or authority, expressed or implied, or that he delivered it by a mistake, or give in evidence any circumstances which show that what he did was done in the fair and honest discharge of a duty to society, or even that he acted *bona fide* in the prosecution of any claim where he supposed himself entitled to a remedy or supposed he possessed any interest. Starkie on Evidence, vol. 2, p. 471-2. Likewise in all cases of what are known as privileged communications, such as information as to the character of servants, or the reputation and standing of business men; if made *bona fide*, the Commonwealth is always held to the proof of express malice, and the truth may be given in evidence to rebut it.

The general rule, however, is well settled, that where a man publishes a writing which, upon the face of it, is libellous, the malice is to be presumed from the fact of publication; and it is unnecessary upon the part of the prosecution to give evidence of any circumstances from which malice may be inferred. Ros. Cr. Ev., 659.

Keeping in view the general principles of law to which I have referred, I will now briefly call your attention to the facts of this case.

In order to justify you in convicting the defendant, the Commonwealth must satisfy you beyond a reasonable doubt of the truth of each of the following propositions, viz.:—

First.—That the alleged libellous article was published by the defendant, or that he caused or procured it to be published.

Second.—That it was published of and concerning the prosecutor, David H. Lane; that it referred to him.

Third.—That said article is of a character to provoke the prosecutor to wrath and to hold him up to public hatred, ridicule, or contempt; and

Fourth.—That it was published maliciously.

The first proposition does not seem to be disputed. The Commonwealth has given evidence to prove that the defendant was city editor of *The Press*, a leading daily paper of this city; that by virtue of such position he had the control of the local department of said paper; that the alleged libel was published in said department; that the heading of the article was written by the defendant, and the body thereof by a reporter, from information furnished by the defendant. Mr. Forney says the article was shown to him by the defendant before it was printed. This evidence, in connection with the testimony as to admissions made to the prosecutor, if believed by the jury, would justify them in the conclusion that the alleged libel was published by the defendant. I do not understand this to be denied by the defense.

Did it relate to the prosecutor? Upon this head you have the fact that the alleged libel refers to one David Lane by name. The prosecutor's name is David H. Lane. In addition to this a number of witnesses, to whom I need not refer more particularly, testified that they believe the prosecutor to be the person meant in said article; that they so understood it. On the other hand, it is contended by the defense that while the article in question refers to the prosecutor by name, it does not necessarily impute to him any disgraceful or unlawful act; that the portion of the publication in which reference is made to the raising of a fund to procure the assassination of Brooks, does not, by necessary implication, and in the ordinary and proper construction of the language, apply to the prosecutor, and that there is no innuendo in the indictment, averring that the prosecutor is meant to be included as one of the persons contributing to said fund. This is a question of fact for the jury. It is true there is no innuendo of the character referred to. The office of an innuendo is to explain an ambiguity apparent upon the face of the libel. Thus, if the alleged libellous matter is capable of a double meaning, and there is a doubt as to to the same in which the words were used, then the meaning which the defendant intended to attach to them may be averred by innuendo. Again, if the prosecutor be not named

in a libel, or if his name be incorrectly given, it may be averred by innuendo that the prosecutor is the person meant, and the truth of the innuendo must be proved as any other fact in the cause. In that portion of the alleged libel where David Lane is named, there is no averment that the prosecutor, David H. Lane, was thereby meant and intended. It will be for the jury to say whether, upon the face of the article in question, aided by this innuendo, and the evidence offered in support of it, they are satisfied beyond a reasonable doubt that the alleged libel meant to include the prosecutor among those who contributed to the fund for the assassination of Brooks. A number of witnesses, Mr. Warburton, Enoch W. C. Greene, John H. Taggart, James Rees, Peter A. B. Widener, Charles A. Porter, and Joseph C. Tittermary, say that they so understood it. On the other hand, the defendant stated that he did not mean to apply the offensive portion of the paragraph to Mr. Lane. You will decide this question of fact.

Should you be with the Commonwealth upon the first and second propositions, then you will proceed to consider and determine the character of the alleged libel. Does it defame the prosecutor? Does it blacken his character and hold him up to public hatred, ridicule, or contempt? It refers to a subject in regard to which there has been, and is now, a high degree of public excitement. A zealous and efficient revenue officer had been deliberately shot and wounded while in the discharge of his duty by an assassin. The Commonwealth contends that this alleged libel charges upon the prosecutor a participation in that crime in this,—that he was one of a number to raise a fund of money "to have the job done." If you believe that the said publication does make such charge against the prosecutor, it will be for you to say whether it tends to blacken his character, and to expose him to public hatred, ridicule, or contempt.

Lastly, was it malicious? If you find the first three propositions submitted to you against the defendant, the publication being proved, its application to the prosecutor established, and the article upon its face a libel, tending to defame the prosecutor

and to blacken his character, then I instruct you that the law presumes that the act was malicious, and no express malice need be proved.

For the purpose, however, of rebutting the presumption of malice, the court permitted the defendant to show "how and under what circumstances and for what purpose Mr. Lane's name was used in the article complained of." This was opening the door to a wide and perhaps unusual field of inquiry. The only person who testified on the part of the defense was the defendant himself. A recent act of Assembly permits a defendant to testify in his own behalf in all cases of misdemeanor, (perjury and forgery excepted,) leaving the jury to pass upon his credibility.

In response to the above question, the defendant stated substantially that "after the conviction of Marra a statement purporting to be the confession of Marra was published in the *Bulletin*, but gave no names. A Sunday paper, the *Transcript*, published the same article with the names in—some of them. There was considerable doubt in my mind about it. After consulting with my reporter, I concluded to publish all that I knew; I instructed him to write all these facts up, giving those original notes of mine to assist him, and we would settle the policy of publishing the entire facts afterwards. He did so, including the statement given him two months before."

The jury will consider this in connection with the other statements of the defendant, and find whether there is anything therein to rebut the legal presumption of malice. If you believe a citizen has been falsely charged with a high crime against society, does the defendant's explanation of the circumstances under which such charge was made relieve him from the presumption of having acted maliciously?

He alleges that the information upon which the article was based was obtained from Mr. Mountjoy. The latter, however, pointedly contradicts the defendant in this respect, and no witness has been called in corroboration of Mr. Taylor's statement. If

true, it is not enough to show that the information was furnished by some one else. The alleged libel is not published as the statement of Mr. Mountjoy, or on his authority. If believed by the jury to have been published by the defendant, he is responsible for all the consequences of his act, and it is immaterial from whom, if from any one, he obtained the information.

When one citizen charges another citizen, through the public press, with the commission of a crime, he does so at his peril. The law devolves upon him no duty of making such charge in such a manner. If the matter charged is one proper for public information, the truth may be given in evidence, and is a justification. But it is no justification for a libel that the promulgator thereof obtained it from some one else. Every person who takes up and gives currency to a libel is responsible therefor.

The District Attorney conceded that the subject-matter of the alleged libel, if true, was proper for public information, and voluntarily opened the door for the admission of the truth in evidence. Under these circumstances the truth of the allegations charged as libellous would have been a complete and perfect defense. No such evidence was offered.

It will be your duty to consider and decide this case upon the evidence, and that alone, under the law as indicated by the court. The jury-box is no place for passion or prejudice. Nor are we called upon to pass upon the wisdom of the law of libel. Your duty is to decide whether the defendant has violated the law as it stands upon the statute-book. In determining this issue you should give the defendant the benefit of every reasonable doubt. If the evidence fails upon either of the material points named, your verdict should be for the defendant. If, on the contrary, the Commonwealth's case has been made out beyond any reasonable doubt, you should do your duty firmly. The impartial performance of your delicate and responsible function is the only thing that can satisfy the law and your own conscience.

I have been asked to charge the jury by the defense as follows:—

"*First.*—It must be malice in the legal sense, which is a conscious violation of the law to the prejudice of another."

This is sufficiently answered in the general charge.

"*Second.*—When the occasion justifies the publication the law will not imply malice."

I affirm this point. In such case the burden is upon the Commonwealth to show the malice.

"*Third.*—The intention to injure must be proved."

The law presumes that a man intends to do that which would be the natural and probable consequences of his act. If the natural result of an act is to injure, the law infers that such was the intent.

"*Fourth.*—If language is general in its application to a particular person, it must be generally received."

I affirm this point.

"*Fifth.*—The jury must consider the intent of publication—the object—and if honestly meant their verdict must be for defendant."

If the effect of the publication was to defame and injure, the law presumes such to have been the intent and object. The question of the honesty of the publication, so far as it has any application to this case, signifies a publication without malice. If the jury find there was no malice they should acquit the defendant. If, however, the article is a libel, and its tendency is to degrade and defame the prosecutor, the law presumes the malice.

"*Sixth.*—The subject of this article was proper for public information, and therefore privileged."

It is conceded by the Commonwealth that the subject of the article was proper for public information. This being so, it was privileged so far as to make the truth a defense.

"*Seventh.*—If the defendant, as a newspaper editor, honestly believed in the truth of the facts published, it is an ingredient to be considered by the jury in determining whether the publication was a libel; that is, whether it exceeds the limits of fair and proper comment."

The fact that the defendant is an editor does not place him in a different position from that of any other citizen. The control of a printing-press confers upon him no immunity whatever to hold a citizen up to public hatred and contempt. A man may freely write and print on any subject, but he is responsible to the law for the abuse of this privilege. In matters proper for public information the truth is a defense; the belief of the editor or person making the publication in the truth of the statement contained therein is not necessarily a defense. If the jury believe that the article in question does not exceed the limit of a fair and proper comment, it is not a libel. But to so find they must be satisfied from the evidence that the allegations contained therein are true.

"*Eighth.*—Actual malice is for the jury."

I affirm that point.

"*Ninth.*—To make this libellous there must be an averment in the indictment that the said David Lane was intended to be described as one of the contributors to that fund raised at the 'Malta,' and that not being done the defendant must be acquitted."

I decline to affirm this point. The jury will find from the alleged libel itself, with the innuendo averring that the prosecutor was the person meant, and the evidence in support of such innuendo, whether the said prosecutor was referred to as one of the contributors of the said fund.